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Goldberg: Public Law 280 isn't the proper economic stimulus for Indian country

By Carole Goldberg
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Despite the prosperity tribal gaming has brought to some Native nations over the past 20 years, poverty and unemployment rates remain high on many reservations.

How can economic conditions on reservations be improved? Searching for the answer to this question has led some scholars to examine the role of tribal sovereignty. Is tribal sovereignty an obstacle or an aid to reservation economic success?

One school of thought, supported by the extensive research of the Harvard Project on American Indian Economic Development, points to tribal sovereignty as part of the solution. According to this view, economic development is fostered when tribes control reservation resources and economies. That's because tribal governments are more directly accountable to tribal members for the consequences of their decisions. Moreover, tribal sovereignty will have this positive effect more often when it is used to create sound and legitimate legal institutions, such as courts, that tribal members and others can use to hold their tribal governments accountable.

A contrary school of thought, advanced by economist Terry Anderson, has recently found its way into the Journal of Law and Economics and the Wall Street Journal. Anderson claims that tribal sovereignty is the reason reservation economies languish. To make his point, he draws attention to Public Law 280, a 1953 federal statute that compromised tribal sovereignty by granting jurisdiction over reservation Indians to six states and allowing other states to opt for similar jurisdiction, regardless of tribal consent.

Using census data, Anderson compares the reservations singled out for state civil jurisdiction with those that are not, and finds the tribes with state jurisdiction have had greater economic success during the period 1969 – 1999, as measured by growth in per capita income. In other words, he claims the tribes that lost sovereignty through state jurisdiction gained in per capita income.

To explain his result, he argues that state jurisdiction enables tribes and

individual tribal members to make “credible commitments” in economic transactions – commitments that are not possible when the only available enforcement mechanism is a (presumably deficient) tribal court. In the Wall Street Journal, he concludes that if a tribal court system can’t meet strict, federally-devised standards, Congress should impose state civil jurisdiction, as it has in Public Law 280.

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Apart from being insulting to tribal courts, Anderson’s study is seriously questionable for three distinct reasons. First, tribal governments, not Congress, are in the best position to make any trade-offs that may exist between greater tribal sovereignty and higher reservation incomes. Tribal sovereignty holds many benefits for tribes, especially the power to address issues such as cultural continuity and the demands of a changing, interdependent world market. Tribal sovereignty also protects tribal citizens from discrimination and hostility in state court systems, something that tribal members have complained about in interviews and surveys I have carried out on state criminal jurisdiction in Indian country.

For those reasons and others, state jurisdiction under Public Law 280 has not been especially popular in Indian country. Since Congress amended it in 1968, tribal consent has been required before a state can opt for jurisdiction on reservations. Thus any tribe that wants the benefits that Anderson touts from state jurisdiction can urge the state to step in. It is striking, however, that no tribe has given its consent to state jurisdiction in the four decades since that amendment passed. Also in 1968, Congress for the first time authorized states to return, or “retrocede,” their Public Law 280 jurisdiction back to the federal government. Although Indian nations were not granted control over this process, they have been in a position to lobby their state legislatures to support retrocession. Despite the many political hurdles tribes must overcome, since 1968, 29 tribes have successfully prevailed upon their states to retrocede.

Of course, tribal communities may not be acting in their best economic interests in rejecting Public Law 280. Another possibility, however, is that no link exists between state jurisdiction and higher reservation incomes. That brings up the second reason to question Anderson’s conclusions. The underlying research is flawed in several ways.

Here are just some of the more technical problems. There are errors in labeling some tribes (such as those in Oregon) as Public Law 280 or non-Public Law 280. The research fails to control for important factors, such as population growth on different reservations over time. The research also ignores the fact that some tribes that figure into its results, such as the Menominee in Wisconsin, were left out of Public Law 280 because of historical events, such as termination, that can

account for the tribes' later economic difficulties.

A more basic research flaw is that the connection Anderson draws between state jurisdiction and "credible commitments" doesn't square with the law or with the way business litigation actually operates in Indian country. The most significant economic factors on most reservations are the tribes themselves; yet most courts have concluded that Public Law 280 did not open state courts to lawsuits against tribes.

How can state courts facilitate "credible commitments" if they can't even hear the most important reservation-based litigation? And even where Public Law 280 may make suits against tribes or tribal officials easier for the non-Indian parties to bring, tribes have to be willing to give up or "waive" their sovereign immunity in order for the litigation to proceed. Yet, Anderson has not demonstrated that tribes subject to state jurisdiction are more likely to grant such waivers.

The third problem with Anderson's conclusion is that the choice between tribal sovereignty and economic development is a false one. President Obama can strengthen tribal sovereignty and economies simultaneously by providing federal technical assistance and funds to tribal justice systems. That is long overdue. Congress has never fully appropriated even the modest funds it authorized more than a decade ago for tribal courts. Yet in 2008 alone, state and local courts received more than $4 billion in federal aid. With proper levels of assistance, tribal courts can support reservation economies in ways that reflect tribal values and priorities. State court jurisdiction can't substitute for that.

Carole Goldberg is a professor of law at UCLA and justice in the Hualapai Court of Appeals.